

of users permitted by the ACLR in special condition 5 in the TOL to use the road and who would presumably not have to pay toll. If it is impossible at this stage for this court to do more, the respondent has only itself to blame.

As for the damages arising from the cancellation of the TOL by the Government, Clause 9 clearly provides that the respondent is not entitled to any such damages. The entire burden of the respondent's complaint at the trial was that the TOL did not have one year to run as it, so it alleged, was induced by the fraud or misrepresentation of the appellant to believe and rely on. But the point, and this point was missed entirely by the trial court, is that in the event, the TOL had more than a year to run and it would have run out that year but for the intervention of the ACLR, a *novus actus interveniens* which the appellant was totally unable to prevent or forestall, which it knew it would be unable to prevent or forestall and which it had so providentially provided for in Clause 9.

Conclusion

I would allow the appeal with costs here and in the court below. There shall be judgment for the appellant in the sum claimed. The counterclaim is dismissed, also with costs.

Syed Othman F.J.: I have had the opportunity of reading the judgments of the learned Chief Justice and my learned brother Chang Min Tat F.J.

I entirely agree with them that this appeal should be allowed on the grounds stated in the judgments and with costs as indicated.

Appeal allowed.

Solicitors: Jayasuriya Kah & Co.; Leong Chong & Tseu.

HOE JOO SAWMILLS v. SIGMA (AIR CONDITIONING) SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo),
Raja Azlan Shah Ag. C.J. (Malaya) and
Wan Suleiman F.J.) February 3, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 26 of 1978]

Practice and Procedure — Appeal — Application for extension of time to serve notice of appeal on respondent — Service by ordinary post — Proof of delivery of letter — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 7 and 32(1) — R.S.C. 1957, O. 67 rr. 2 and 3.

In this case the appellant had been granted leave to appeal from the judgment of the High Court whereby the respondent was given liberty to sign final judgment against the appellant. Notice of appeal was filed by the appellant within the one month allowed by the rules but there was a question whether the copy of the notice of appeal was served on the respondent within that period. The appellant alleged that a copy of the notice was sent to the respondent by ordinary post. The appellant applied by a notice of motion for an order that (a) service of the notice be deemed as good and effective service on the respondent, or (b) the time for service of the notice of appeal on the respondent be extended.

Held: (1) the posting of the notice, even if effected within time cannot by itself be deemed or considered to be sufficient service in the absence of proof of actual delivery and of the date of delivery;

(2) the reason given for the application for extension was the fault of the solicitor's clerk and this has been decided to be insufficient for the granting of special leave.

Cases referred to:-

- (1) *Tan Ting Kok v. Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153, F.C.
- (2) *Tong Lee Hwa & Anor. v. Malayan Banking Berhad* [1978] 1 M.L.J. 257.
- (3) *Hendry v. De Cruz* [1949] M.L.J. Supp. 25.

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FEDERAL COURT.

Khoo Eng Chin for the appellant.

Raja Abdul Aziz for the respondent.

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Raja Azlan Shah Ag. C.J. (Malaya) (delivering the judgment of the Court): The substantial question that arose in the motion before this court is that of service of the notice of appeal by the applicant qua appellant on the respondent. Leave having been granted to the applicant to appeal from an interlocutory judgment on April 13, 1978 on the same day it was entered, the applicant was required by rule 7 Federal Court (Civil Appeals) (Transitional) Rules, 1963 to file in the Registry his notice of appeal within one month from the judgment and serve a copy of the same on the respondent at the same time. "At the same time" does not mean simultaneously. So long as the service on the respondent was effected within one month of the judgment sought to be appealed from, the service was effective: *Tan Ting Kok v. Cheong Lep Keen & Anor.*⁽¹⁾ But unless both filing and service are effected within this period, the appeal has not been brought to the Federal Court, and no appeal lies except by the special leave of the full Federal Court: Rule 13.

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No difficulty presents itself over the filing of the notice of appeal in the Registry of this court. It was done on April 27, well within the one month allowed. But there is some dispute over the service on the respondent. The respondent averred that up to the present, it has not been served. The appellant would appear to contend that it effected the service by ordinary post on May 5. What it really contended was that it put through the post a copy of the notice for postal delivery to the respondent but it was obviously unable to say with any certainty whether the letter was in fact delivered and if so, when. It is to be remembered that it had to be delivered on or before May 13, 1978. The appellant nevertheless considered that it had effected the service on the respondent but notwithstanding this contention, applied by notice of motion for an order that:

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(a) the service of the notice of appeal on the respondent/plaintiff herein on May 5, 1978 be deemed as valid and effectual service of the same on the respondent, or

(b) the time for service of the notice of appeal on the respondent be extended,

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and by an amendment (c) for special leave.

With respect the first order prayed for appears to be an inconsistency. Service is a question of fact. If the notice was served within time, the service was good and no necessity arises for any prayer in aid. But apparently it was thought that service by ordinary

post failed to comply with the requirements of rule 32(1) which reads:

"Service of any document under these Rules may be effected by:

- (a) Handing the document to the solicitor for the party to be served or to any person employed by the said solicitor or, where the party has no solicitor, to the said party in question; or
- (b) Posting the document by prepaid registered post addressed to the solicitor for the party, or where the party has no solicitor to the party at the address for service of the party furnished under rule 31 of these Rules."

and therefore it was necessary to seek an order in terms of the first prayer. However, Mr. Khoo for the appellant contended that the word "may" in the said rule is not mandatory but permissive. I agree that this rule does not prescribe the mode of service. It merely prescribes a method which effectively produces evidence of service from the acknowledgment of the respondent on the registration-reply card which would ensure that the appeal has been brought to this court. Service by ordinary post would be substantial compliance with the requirements of the rule, if there is irrefutable evidence other than the mere fact of posting that the letter was in fact delivered and the delivery was within time, and as has been earlier observed, even the appellant in the quandary it now finds itself is unable to assert affirmatively the actual delivery and the date of the delivery. The prayer is of its nature a rule of procedure which only the Rules Committee can make.

But apart from the inconsistency of the appellant's argument, it has also to be realised that it is predicated on the supposition that the letter was in fact put through the post on May 5. Be that as it may, there is some considerable doubt on the evidence produced. The evidence is contained in an affidavit of the solicitor in charge of the appeal. He was not the one who would have posted the letter if in fact it was posted, so that any assertion by him to this effect would be hearsay and inadmissible and not probative of the fact of posting. The proper person to make the affidavit would be the clerk who posted the notice but if there was such a person, he or she did not affirm anything of this sort. Insofar as the solicitor's affidavit is concerned, what happened on May 5 was that the appellant's solicitors filed and served a notice of motion for a stay of execution on the respondent's solicitors. This service was personal. The respondent's solicitors raised the question of whether any appeal had been brought only in an affidavit affirmed on May 17, 1978. The appellant's solicitor conceded that this affidavit made him aware that the notice of appeal had not been received by the other side. This was entirely conceivable but he went on to say that on May 5, his clerk had realised after the service of the notice of an application for a stay that the notice of appeal had not been previously served, that she had told him so and that he had instructed her to send the said notice by registered post and that later on May 17, he had learned that instead of the registered post, ordinary posting was used. How the chief clerk realised on May 5 the failure to serve the notice has not been explained, neither was any reason given to explain why if she had come to this realisation, she had not repaired the omission herself

A or through a member of the staff by personal service on the solicitors who were within easy reach, if not on the same day, at least, on the next day when it would have been entirely within time, rather than risk a confession of an omission to her employer and the ordinary post instead of the registered post. It would appear that the odds are against the events that are alleged to have occurred on May 5 after the service of the notice for a stay of execution and in favour of a finding that the appellant's solicitor did not realise the failure to serve the notice until May 17, that is, until the one month had fully expired. If so, any remedial action would be too late.

C But the question of whether an appeal has been brought or not stands to be determined by whether the notice had been served on the respondent within time. As observed earlier, the appellant could not and did not contend that it had been so served and as the rules now stand, there is no appeal brought before this court: see the judgment of this court in *Tong Lee Hwa & Anor. v. Malayan Banking Berhad.*⁽²⁾ In the absence of any provision in favour of solicitors as there is in favour of any office of the High Court in Order 67 rule 3, Rules of the Supreme Court, the posting of the notice if effected on May 5 cannot by itself be deemed or considered to be sufficient service, (see also Order 67 rule 2), and this court not being a Rules Committee cannot make an order in terms of the first prayer.

F As for the alternative prayer, the reason given was the fault of the solicitor's clerk and this has been decided to be insufficient for the granting of special leave: *Hendry v. De Cruz.*⁽³⁾ What the appellant should have prayed for is the special leave of the full Federal Court. But unless it could advance other grounds that this court can properly regard as deserving the special leave, it would fail. It almost certainly realises it could not. It therefore abandoned this prayer. For the same reason, no special leave could be granted.

G The motion was dismissed with costs.

Motion dismissed.

Solicitors: *Ambiavagar & Co.; Chor Pee & Hin Hiong.*

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